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In the Supreme Court of the United States

CHARLES THOMAS DICKERSON,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE STATES OF SOUTH CAROLINA, ET Al.,* AS AMICI CURIAE URGING AFFIRMANCE

CHARLES M. CONDON
Attorney General for the State of South Carolina
TREVA ASHWORTH
Deputy Attorney General
KENNETH P. WOODINGTON
Counsel of Record
Senior Assistant Attorney General
TRACEY COLTON GREEN
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680
Counsel for Amici States

*The States joining this brief are listed on the inside cover

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The States joining this brief are **South Carolina, Delaware, Colorado, Pennsylvania, Virginia, Tennessee, Florida, Nebraska, Hawaii, South Dakota, Alabama, Alaska, Mississippi, Utah, Idaho, Kansas and Nevada.** Also joining is the Territory of the **United States Virgin Islands.**

M. Jane Brady
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801

Ken L. Salazar
Attorney General
State of Colorado
1525 Sherman Street, 7th Fl.
Denver, CO 80203

Frankie Sue Del Papa
Attorney General
State of Nevada
100 N. Carson St.
Carson City, NV 89701-4717

Alan G. Lance
Attorney General
State of Idaho
P. O. Box 83720
Boise, ID 83720-0010

Mark L. Earley
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

Michael C. Moore
Attorney General
State of Mississippi
P. O. Box 220
Jackson, MS 39205

D. Michael Fisher
Attorney General
Commonwealth of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Bruce M. Botelho
Attorney General
State of Alaska
P. O. Box 110300
Juneau, AK 99811-0300

Earl I. Anzai
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

Mark Barnett
Attorney General
State of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

Paul G. Summers
Attorney General
State of Tennessee
425 5th Avenue, North
Nashville, TN 37243-0493

[continued on next page]

Bill Pryor
Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36130

Jan Graham
Attorney General
State of Utah
236 State Capitol
Salt Lake City, UT 84114

Carla J. Stovall
Attorney General
State of Kansas
2nd Floor Kansas Judicial Ctr.
301 S.C. 10th Avenue
Topeka, KS 66612-1597

Don Stenberg
Attorney General
State of Nebraska
2115 State Capitol Building
Lincoln, NE 68509-8920

Robert A. Butterworth
Attorney General
State of Florida
Plaza Level 01, The Capitol
Tallahassee, FL 32399-1050

Iver A. Stridiron
Attorney General
U.S. Virgin Islands
48B-50C Kronprindsens Gade
St. Thomas, U.S.V.I.

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INTEREST OF AMICI

The interest of the States in this case is obvious, even though 18 U.S.C. Section 3501 applies only in federal criminal proceedings. To the extent, if any, that the Court permits the admission of unwarned but voluntary confessions under Section 3501, some States undoubtedly would adopt procedures similar to any which this Court might approve.

Even though the Court stated in *Miranda* that the procedures set forth therein should not be regarded as "a constitutional straitjacket which will handicap sound efforts at reform," 384 U.S. at 467, the case has been regarded as just that for nearly thirty-four years. Subsequent cases have not approved alternatives to the *Miranda* procedures–they have only found instances where for one reason or another the procedures did not apply. The States thus have an abiding interest in seeing how they might develop "increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of [state] criminal laws." 384 U.S. at 467. The effectuation of this promise made by the *Miranda* court is an event which is long overdue.

The States also have an overpowering interest in seeing that the guilty are punished and the innocent set free. To the extent that it prevents voluntary confessions from occurring at all, *Miranda* increases the chances that the innocent will be punished; and to the extent that it prohibits the use of voluntary confessions once given, *Miranda* greatly increases the chances that the guilty will be set free.

SUMMARY OF ARGUMENT

The holdings of *Miranda* and the provisions of Section 3501 may and should be read together harmoniously as creating a rule which expresses a strong preference for giving the *Miranda* warnings but without automatically requiring the suppression of confessions which are voluntary but unwarned. By permitting the admission of unwarned but voluntary confessions upon a strong showing of voluntariness, this proposed procedure would preserve the dual ends of preventing involuntary custodial confessions while at the same time preventing acquittals based on technicalities.[1]

Miranda's exclusionary rule for unwarned custodial confessions amounts to an irrebuttable presumption that such confessions are involuntary. The Court's language in *Miranda* indicates that the rule thus created was intended by the Court to be a rule of procedure or evidence, subject to modification by Congress and the States.

In the late 1960's, Congress conducted hearings and developed evidence showing the effects of *Miranda* on law enforcement. After weighing the competing policies in light of the facts it found, Congress enacted Section 3501.

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[1] Amici States are aware, of course, that the United States and others argue that if Section 3501 is read as simply reinstating the pre-*Miranda* voluntariness test, then either the statute must be regarded as unconstitutional, or *Miranda* must be substantially modified in order to accommodate the statute. Amici States submit that the two can be harmonized without the need for such a collision.

It is not necessary to overrule *Miranda* in order to hold Section 3501 constitutional. Section 3501 should be given a reading which will preserve its constitutionality and harmonize it with *Miranda*. Section 3501 thus should be read as substituting a rebuttable presumption for *Miranda*'s irrebuttable presumption, that is, as Congress's mandate concerning the standards which need to be met if the confession is still to be admitted. Applying the statute in this manner is permissible in order to preserve its constitutionality.

If the Court permits the use of the standards in Section 3501 as a means to rebut *Miranda*'s presumption of inadmissibility, the States would then be given the opportunity to craft rules of their own which would balance the need for voluntary confessions with the need to protect Fifth Amendment rights. Such state procedures could simply copy the approach of Section 3501, or they could be more innovative. For instance, a guarantee of voluntariness might be obtained through videotaping of custodial confessions, a measure which was not conveniently available in the late 1960's.

If the Court reaffirms that the *Miranda* warnings are not themselves constitutional rights, such a holding would preserve the existing rule that law enforcement officers are not liable under 42 U.S.C. § 1983 for not giving the warnings.

Finally, the States submit that regardless of the outcome of this case, the Court should reiterate that the *Miranda* procedures were intended as provisional,

prophylactic rules which may be modified by appropriate state and federal rulemaking bodies.

ARGUMENT

I. The Exclusionary Rule Created By *Miranda* Is An Evidentiary Presumption That A Confession Elicited Without The Required Warnings Is Involuntary.

This Court has described *Miranda's* exclusionary rule as a presumption. *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 307 n.1 (1985)(*Miranda* violation affords a "legal presumption of coercion, requiring suppression of all unwarned statements)"; *New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984)(under normal circumstances, an unwarned confession is "presumed compelled"). In *Oregon v. Elstad, supra,* the presumption is characterized as "irrebuttable for purposes of the prosecution's case in chief." 470 U.S. at 307.[2]

The language of the *Miranda* opinion indicates that the Court regarded its exclusionary rule as a rule of evidence. Thus, for instance, the Court spoke of "potential

[2] As other amici in support of affirmance are arguing, the warnings themselves are "prophylactic" and therefore not constitutionally required. Because the *Miranda* warnings are prophylactic in nature, the *Miranda* procedure "is merely one method of satisfying the requirements of the Constitution" to protect the right against compulsory self incrimination. As a result, Congress and the States may "craft procedures that, in terms of policy, are superior to, or at least as good as," those in *Miranda*. *Smith v. Robbins*, 120 S. Ct. 746, 759 (2000).

alternatives for protecting the [Fifth Amendment] privilege which might be devised by Congress or the States in the exercise of *their creative rule-making capacities*." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)(emphasis added). *See also,* 384 U.S. at 490 ("the Constitution does not require any *specific code of procedures* for protecting the privilege")(emphasis added). Moreover, the Court regarded its rule as only a provisional one, to remain in effect only for as long as it took Congress or the States to enact other procedures which would serve the same functions. This view is reflected in the Court's encouragement to Congress and the States "to continue their laudable search for increasingly effective ways of promoting the rights of the individual while promoting effective enforcement of our criminal laws." *Id.* All of this language clearly describes the processes used to revise procedural rules; such language is inconsistent with any argument that the exclusionary rule was so critical to the decision that it could not be altered in the least by Congress or the States.[3]

II. Section 3501 Should Be Construed As Reflecting Congress's Judgment That The Presumption Of Inadmissibility Created By *Miranda* Is Rebuttable, And As Establishing The Standards For Rebutting the Presumption.

[3] In addition, if the conclusive presumption of inadmissibility were regarded as a fixed constitutional rule, a number of qualifying statements by the *Miranda* majority would be rendered meaningless. *See, e.g.*, 384 U.S. at 467 ("[o]ur decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform").

A. In Enacting Section 3501, Congress In The Exercise Of Its Rulemaking Power Determined That *Miranda*'s Irrebuttable Presumption Rule Should Be Modified.

One of the most durable principles of federal jurisprudence is that Congress has the power "to prescribe rules of evidence and standards of proof in the federal courts." *Vance v. Terrazas*, 444 U.S. 252, 265 (1980). This "traditional" power, *id.*, has been recognized "[f]rom almost the founding days of this country." *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992). The roots of this Congressional authority lie in the constitutional authority of Congress to create inferior federal courts. U.S. Const., Art. 1, § 8, cl. 9. *Vance, supra,* cites a number of other cases in which this "undoubted" power of Congress has been noted and sustained. 444 U.S. at 266, citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976); *Hawkins v. United States*, 358 U.S. 74, 78 (1958); and *Tot v. United States*, 319 U.S. 463 (1943).

Section 3501 represents an exercise of this Congressional power to prescribe rules of evidence and standards of proof. The enactment of this legislation was explicitly undertaken pursuant to Congress's "power to prescribe rules of evidence in Federal courts," and in "respon[se] to the [*Miranda*] majority's invitation to Congress" to do so. [Senate Comm. Report, 1968 U.S.C.C.A.N. at 2137]. By enacting Section 3501, Congress concluded that *Miranda*'s irrebuttable presumption of inadmissibility failed to achieve the correct result in an unacceptably high number of cases and therefore was based on an unsound policy.

1. Section 3501 reflects the Congressional determination that the procedures established by *Miranda* did not achieve the correct result in many cases.

In determining whether a conclusive presumption should be imposed, the issue is whether the "supposed injurious results" from admitting evidence are "of greater consequence than the predominance of truth over error. . . ." *United States v. Provident Trust Co.*, 291 U.S. 272, 282 (1934). The *Miranda* court undoubtedly believed that the "supposed injurious results" of permitting unwarned custodial questioning were harmful enough to require the exclusion of all unwarned custodial confessions. After reviewing several years' experience with *Miranda*, however, Congress disagreed with both the factual and policy judgments of the Court on this issue.

There was nothing in the record of *Miranda* which suggested that holding unwarned confessions to be involuntary "achieve[d] the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722 (1991). To hold otherwise would be to suggest that practically all custodial confessions in the pre-warning era were involuntary. Moreover, even if a substantial percentage of all unwarned custodial confessions were in fact involuntary (a fact as to which there is no evidence), the remaining cases, i.e., the ones in which the presumption is wrong, are not unimportant cases. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977)(presumptions reflect a "judgment that [cases involving exceptions] are not sufficiently common or important to justify the time and

expense necessary to identify them"). To the contrary, in many cases the exclusion of an unwarned but voluntary confession precludes the successful prosecution of the person who confessed. Many, if not all, of the offices of Attorney General of the amici States have been directly involved in such cases.

Even though *Miranda*'s irrebuttable presumption has undoubtedly led to the suppression of voluntary confessions in a number of cases, the Court's rule was, prior to action by Congress, the only procedure in place to effectuate the core holdings of the case. However, it is undeniable that Congress had before it a great deal more information than could be placed before the Court in a single case; in addition, Congress had the benefit of reviewing the results of several years of the *Miranda* rules being applied in practice.

This Court has frequently recognized that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997). Indeed,

> [t]he process of making the determination of rationality [of presumptions] is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.

United States v. Gainey, 380 U.S. 63, 67 (1965). This rule is appropriate for this case: the determination of the overall numbers and types of cases in which involuntary confessions occur, or in which guilty defendants go free, is not within "specialized judicial competence." The courts can only adjudicate one case at a time, and individual criminal cases do not provide vehicles for the presentation and review of facts concerning *Miranda*'s effects.[4] Moreover, as *Gainey, supra,* indicates, Congress's findings receive this deference even when the conclusive presumption establishes substantive criminal liability, rather than a mere evidentiary presumption.

2. Section 3501 reflects the Congressional determination that the procedures established by *Miranda* were unsound.

This Court has held that "conclusive presumptions [are] designed to avoid the costs of excessive inquiry where a per se rule will achieve the correct result in almost all cases." *Coleman v. Thompson, supra*. In addition to simple convenience, a conclusive presumption reflects the choice

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[4] The difficulties of presenting verifiable "legislative facts" in a single criminal case are perhaps inadvertently illustrated by the amicus brief of Griffin B. Bell, et al. In contrast to the "Brandeis brief" approach of collecting judicially-noticeable facts for presentation to the Court, the Bell brief presents a collection of *opinions* about facts, given largely to news media. Amicus Brief of Bell, et al., at 8-11. By contrast, statements given to legislative committees can be tested by questions from individual Congressmen or state legislators; and statements in court, if these facts were actually on trial, could be tested through cross-examination.

to advance a "policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof." *United States v. Provident Trust Co., supra.* In the same case, the Court quoted an 1844 treatise as follows:

> By an arbitrary rule, to preclude a party from adducing evidence which, if received, would compel a decision in his favor, is an act which can only be justified by the clearest expediency and soundest policy.

Id. at 282, quoting Best, Presumptions of Law and Fact, § 18 (1844).

The Senate Committee Report on Section 3501 states that the Committee heard a "mass of evidence," which included "[i]nstance after instance" of documented post-*Miranda* cases "where the most vicious criminals have gone unpunished, even though they had voluntarily confessed their guilt." S. REP. NO. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. at 2132. Based on this evidence, the Senate Committee was "convinced . . . that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement." *Id.* The Committee further concluded that

> it simply makes no sense to exclude from a jury what has traditionally been considered the very highest type of evidence, and the most convincing evidence of guilt, that is, a voluntary confession or incriminating statement by the accused.

Id. at 2136.

Simply put, the *Miranda* court's procedural mechanism for insuring that confessions complied with the Fifth Amendment was to exclude as involuntary all unwarned confessions. Congress, exercising its rulemaking powers for the federal courts, disagreed.[5]

B. Section 3501 Should Be Construed As Permitting *Miranda*'s Irrebuttable Presumption To Be Rebuttable By A Showing Based On The Factors Listed In Section 3501.

It is axiomatic that a limiting construction can be placed on a statute where necessary to resolve any doubt about the statute's constitutionality. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 191 (1991)(citing cases for the "elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality"). The assumption underlying this rule

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[5] Petitioner and the United States make no effort to discuss statistics dealing with the effects of *Miranda*. The United States claims that the effects of *Miranda* are still a matter of debate. U.S. Br. at 32 n.23. However, no amount of statistical massaging can conceal the dramatic drop in the rate of cleared violent crimes which began just after *Miranda* and which has remained at the lower levels ever since. This information is reproduced in a chart which appears as Appendix A to the Brief Amicus Curiae of Washington Legal Foundation in Partial Support of Petitioner.

is that Congress is aware of constitutional limitations on its power and seeks to tailor its legislation accordingly. As stated by Justice Holmes in *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924):

> We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law.

264 U.S. at 307. It is clear from the legislative history that Congress intended to restore voluntariness to the limits of its constitutional power to do so. If the only way to hold Section 3501 constitutional is to limit its use to rebutting the *Miranda* presumption that unwarned confessions are involuntary, such an application of the statute would be consistent with the overall intent of Congress. The language of the statute can be taken as it is, and applied only as a means of rebutting *Miranda*'s presumptions, rather than as a stand-alone test of admissibility. Such a construction would not strain the language of the act.

The States accordingly submit that the appropriate result is for the Court to preserve as much of Section 3501 and the *Miranda* decision as may be made mutually consistent. This can be accomplished by reiterating (a) that a warned confession will normally be regarded as voluntary, and an unwarned one will be presumed involuntary, but (b) by also holding that Congress may alter the irrebuttable presumption created by *Miranda*, and that Section 3501 should be construed as establishing the standards for rebutting the presumption of involuntariness which would still attach to an unwarned custodial confession. Such a

construction would preserve much of the Congressional intent while at the same time preserving the general rule of *Miranda* that the warnings are the best evidence of voluntariness.[6]

The practical effect of the result the States urge is that in most cases the warnings will continue to be given. When law enforcement officers administer the warnings required by *Miranda*, any resulting confession is normally regarded as voluntary and admissible, *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984), so a strong incentive exists for giving the warnings and eliminating the possibility that a confession will be excluded. The amici States submit, however, that in cases where for some reason the warnings are not given, Section 3501 should be construed as allowing the presumption of inadmissibility to be overcome by a showing that the confession was in fact voluntary, using the standards set forth in Section 3501 as a guideline.

III. Treating The *Miranda* Warnings As Establishing A Rebuttable Presumption Would Give The

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[6] Even if applying Section 3501 in this way would cause the statute to apply less fully than Congress intended, this interpretation is infinitely closer to Congress's intent than the suggestion by amicus House Democratic Leadership that Section 3501 should be regarded as nothing more than "largely symbolic." Br. of House Democratic Leadership at 19. This startling approach to the validity of legislation is at odds with centuries of precedent in which the courts have striven to avoid declaring statutes invalid. Thus while some amici urge that Congressional statutes can be regarded as "symbolic," others urge that in litigation, untested opinions can substitute for facts, *see* n.4, *supra*. These views are generally inconsistent with the concept of democratic self-government.

States The Opportunity To Experiment With Alternative Approaches To Regulating Interrogation.

If Section 3501 is upheld as establishing standards for determining the admissibility of confessions obtained without the *Miranda* warnings in federal cases, the effect of such a decision will be to permit the States to craft standards of their own. Some States will no doubt continue to follow the *Miranda* procedures. *See, e.g., State v. Jones*, 205 Conn. 638, 534 A.2d 1129, 1202 n.3 (1987) (recognizing that *Miranda* warnings have independent significance under the state constitution); *Traylor v. State*, 596 So.2d 957, 965-66 (Fla. 1992) (result similar to *Miranda* under the Self-Incrimination Clause of Article I, Section 9, Florida Constitution); *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657, 664 (1971) (similar, applying Hawaii Constitution's privilege against self-incrimination); *State in Interest of Dino*, 359 So.2d 586, 589 (La. 1978), cert. denied, 439 U.S. 1047 (discussing La. Const. Art. 1, § 13 and concluding "[b]y adoption of this provision Louisiana enhanced and incorporated the prophylactic rules of Miranda v. Arizona"); *State v. Prevost*, 141 N.H. 647, 690 A.2d 1029, 1032 (1997) ("In New Hampshire, before evidence obtained during custodial interrogation can be used against a defendant, the State must establish 'beyond a reasonable doubt that the defendant was apprised of his constitutional rights and that his subsequent waiver was voluntary, knowing, and intelligent"); *State v. Prickett*, 324 Or. 489, 930 P.2d 221, 223 (Ore. 1997) ("This Court has held that Article I, section 12 [of the Oregon Constitution] requires that a police officer give Miranda-like warnings before questioning a person

who is in 'full custody'"); Texas Code Crim. Proc. Ann. art. 38.22 (codifying *Miranda* warnings and exceptions).

Other States may experiment with approaches such as videotaping or audiotaping of interrogations. *See Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (requiring electronic recording custodial interrogation under Alaska Constitution); *State v. Scales*, 518 N.W.2d 587, 591-93 (Minn. 1994) (requiring electronic recording of custodial interrogation under court's supervisory power). Other States may move more in the direction of Section 3501. See Ariz. Rev. Stat. Ann. § 13-3988 (similar to 18 U.S.C. § 3501(a), -(b), and -(d)).

Finally, some States may decide go beyond the Miranda rules and give even more protection to suspects. See, e.g., *People v. Harris*, 77 N.Y.2d 434, 568 N.Y.S.2d 702, 570 N.E.2d 1051 (1991) (declining to follow *New York v. Harris*, 495 U.S. 14 (1990), on grounds of "indelible" right to counsel under New York law that cannot be waived outside presence of an attorney); *People v. Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 (N.Y. 1976) (once police know or have reason to know that an attorney has become involved in the case of a suspect in custody, they many not obtain a waiver of the right to counsel in the absence of that attorney).

Regardless of the precise response of the States to a decision upholding Section 3501, the result would be that "the laboratory of the States" would be directed toward "the . . . challenging task of crafting appropriate procedures." *Cruzon v. Director, Mo. Dept. of Health*, 497 U.S. 262, 292 (O'Connor, J., concurring); *Smith v. Robbins, supra*, 120

S.Ct. at 758 (2000). No longer would *Miranda*'s procedures stand as a judicially-imposed "categorical remedy [which] pretermit[s] other responsible solutions being considered in Congress and state legislatures." *Smith v. Robbins, supra,* at 758 (quoting Kennedy, J., concurring, in *Murray v. Giarratano*, 492 U.S. 1, 14 (1989)).

IV. A Holding By This Court That The Warnings Themselves Are Not Constitutionally Required Would Reinforce The Settled Conclusion That There Can Be No Section 1983 Liability For Failure To Provide The Warnings.

A reaffirmance by this Court of the non-constitutional character of the *Miranda* rules would prevent the unnecessary expansion of civil liability against police agencies. Many federal courts of appeals have concluded that because the *Miranda* procedures are not required by the Constitution, departures from them are not actionable under 42 U.S.C. § 1983. *See, e.g., Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 17 (1st Cir. 1995); *DeShawn v. Safir*, 156 F.3d 340, 346 (2d Cir. 1998); *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994); *Clay v. Brown*, 151 F.3d 1032 (7th Cir. 1998)(table); *Winsett v. Washington*, 130 F.3d 269, 274 (7th Cir. 1997); *Warren v. City of Lincoln*, 864 F.2d 1436, 1441-42 (8th Cir. en banc), cert. denied, 490 U.S. 1091 (1989); *Lucero v. Gunter*, 17 F.3d 1347, 135-51 (10th Cir. 1994); *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976). In the swirling and often harried circumstances in which police questioning must of necessity often place, it would be inappropriate to allow line law enforcement officers and their employing agencies to be sued whenever they deviated from the *Miranda* regime.

V. The Application Of *Miranda*'s Prophylactic Rules To The States Should Be Approached With Caution.

In keeping with principles of federalism, this Court repeatedly has acknowledged that it has no supervisory powers over state-court proceedings beyond those necessary "to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982); *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) ("Our cases dealing with the requirements of voir dire are of two kinds: those that were tried in federal courts, and are therefore subject to this Court's supervisory power * * * and those that were tried in state courts, with respect to which our authority is limited to enforcing the commands of the United States Constitution"); *Victor v. Nebraska*, 511 U.S. 1, 17 (1994) ("we have no supervisory power over the state courts").

Accordingly, even if Section 3501 should be declared invalid, amici States would urge that the Court proceed cautiously in describing the manner in which the *Miranda* warnings apply to the States. Because this Court has held that the warnings are merely prophylactic, the requirements should be regarded as, at most, interim procedures which protect constitutional rights only until other procedures can be adopted by state bodies with the power to set such rules for the courts of the States. Any suggestion that the States cannot alter prophylactic rules, or that such rules may only be altered by federal authorities, creates a risk to our federal system of government, under which the "primary authority for defining and enforcing the criminal law" rests with the States, *United States v. Lopez*, 514 U.S. 549, 561 n. 3 (1995). *See also, Heath v. Alabama*, 474 U.S. 82, 93 (1985)

("The Constitution leaves in the possession of each State 'certain exclusive and very important portions of sovereign power.' * * * Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code"); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) ("This Court has emphasized repeatedly the fundamental policy against federal interference with state criminal prosecutions."); *Moran v. Burbine*, 475 U.S. 412, 425 (1986) ("Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege"). The States therefore respectfully submit that the Court should reaffirm the powers of Congress and the States, respectively, to make appropriate alterations to prophylactic rules.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES M. CONDON
Attorney General for the
State of South Carolina

TREVA ASHWORTH
Deputy Attorney General

KENNETH P. WOODINGTON
Counsel of Record
Senior Assistant Attorney General

TRACEY COLTON GREEN
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

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